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# Donald Ray Combs v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0128

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**KYSC1976-SC-0128-01**

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# **APPELLANT'S BRIEF**

SUPREME COURT OF KENTUCKY

FILE NO. 76- 128

DONALD RAY COMBS

APPELLANT

VS.

APPEAL FROM HARLAN CIRCUIT COURT  
HON. JAMES C. BROCK, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT

JACK EMORY FARLEY  
PUBLIC DEFENDER  
COMMONWEALTH OF KENTUCKY  
625 LEAWOOD DRIVE  
FRANKFORT, KENTUCKY 40601

BY: Anna H. Isaacs  
ANNA H. ISAACS  
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed, postage prepaid, to Hon. James C. Brock, Judge, Harlan Circuit Court, Harlan County Courthouse, Harlan, Kentucky 40831; Hon. Wix Unthank, Commonwealth Attorney, 26th Judicial District, Harlan, Kentucky 40831; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 15th day of March, 1976.

Anna H. Isaacs

FILED

MAR 19 1976

Margie Layne Collins  
CLERK  
Supreme Court of Kentucky

## TABLE OF CONTENTS AND AUTHORITIES

<u>STATEMENT OF THE QUESTION PRESENTED</u> . . . . .	1
<u>STATEMENT OF THE CASE</u> . . . . .	1
<u>ARGUMENT</u>	
THE COURT BELOW ERRED IN OVERRULING THE DEFENSE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE . . . . .	3
<u>Moore v. Commonwealth</u> , 282 S.W.2d 613 (1955) . . . . .	3
<u>Bradley v. Commonwealth</u> , 201 Ky. 413, 257 S.W. 11 (1923) . . . . .	3
<u>Roberts v. Commonwealth</u> , 212 Ky. 791, 280 S.W. 111 . . . . .	3
<u>Warfield v. Commonwealth</u> , Ky., 334 S.W.2d 913 (1960) . . . . .	3
<u>Levering v. Commonwealth</u> , 132 Ky. 666, 117 S.W. 253 (1909) . . . . .	4
<u>Hodges v. Commonwealth</u> , Ky., 473 S.W.2d 811 (1971) . . . . .	6
<u>Ralya v. Commonwealth</u> , Ky., 495 S.W.2d 506 (1973) . . . . .	6
<u>CONCLUSION</u> . . . . .	6

SUPREME COURT OF KENTUCKY

FILE NO. 76-128

DONALD RAY COMBS

APPELLANT

VS.

APPEAL FROM HARLAN CIRCUIT COURT  
HON. JAMES C. BROCK, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTION PRESENTED

DID THE COURT BELOW ERR IN OVERRUL-  
ING THE DEFENSE MOTION FOR A DIRECTED  
VERDICT OF ACQUITTAL AT THE CLOSE  
OF THE EVIDENCE?

STATEMENT OF THE CASE

The March 1975 term of the Harlan County Grand Jury indicted Donald Ray Combs and Gary Lynn Bryant for having violated KRS 433.220 on December 11, 1974 (Transcript of Record, hereinafter T. R., p. 1).

After several continuances (T.R., pp. 9, 10, 19) the case was brought to trial on November 20, 1975 (T.R., p. 18). The principle witnesses for the Commonwealth were Rev. Ernest Boggs, Trooper Steven Duff and Deputy Larry Lewis. Lewis and Duff had stopped a car in Harlan the night of December 11, 1974 (Transcript of Evidence, hereinafter T.E., p. 9). Gary Bryant was driving (T.E., p. 9). Donald Combs and Bobby Boring were passengers. Bryant and Boring ran from Lewis and Duff (T.E., pp. 10, 13). The car was

discovered to belong to Rev. Boggs, who had observed it appropriately in his driveway an hour before (T.E., pp. 2,3).

Combs told Lewis and Duff at the time that he didn't know Bryant and Boring (who had just run away) (T.E., p. 10). He later admitted who they were and stated they had picked him up hitchhiking (T.E., p. 24). When Gary Bryant was apprehended he told Duff that he and Combs were hitchhiking and a stranger picked them up (T.E., p. 33). His subsequent written statement admitted that Boring picked him up first and after that Donald Combs was given a ride (T.E., p. 34).

At the close of the Commonwealth's evidence and again at the close of all the evidence both defendants moved for directed verdicts of acquittal, which were overruled (T.E., pp. 19, 35).

Immediately prior to the presentation of the defense evidence the following occurred between Donald Combs' attorney and the trial court:

Mr. Wm. Murphy Howard: Your Honor,  
could we have a five minute  
recess?

The Court: No. You've had a year.  
Proceed. This indictment was  
returned in March. Proceed with  
your proof.

(T.E., p. 20)

After the defense evidence and the Commonwealth rebuttal the jury was instructed over the objection of Donald Combs' attorney on the offense of operating a motor vehicle without the consent of the owner and on the liability of an aider and abettor (T.E., pp. 36, 37).

The jury found Gary Bryant guilty as a principal and Donald Combs guilty as an aider and abettor, fixing the punishment of each at confinement for three years (T.E., p. 40).

From the Judgment on that verdict, Donald Combs now prosecutes this appeal (T.R., p. 32).

## ARGUMENT

THE COURT BELOW ERRED IN OVERRUL-  
ING THE DEFENSE MOTION FOR A  
DIRECTED VERDICT OF ACQUITTAL AT  
THE CLOSE OF THE EVIDENCE.

Viewing the evidence adduced at trial below in the light most favorable to the Commonwealth, the following facts are revealed. Appellant, Donald Combs, was in the company of Gray Bryant and Bobby Boring approximately fifteen minutes before Rev. Boggs' car was stolen (T.E., pp. 18, 14). Combs was in the car when it was stopped (T.E., p. 10). No evidence was adduced regarding whether Combs participated in any way in the taking or operating of Rev. Boggs' automobile. Neither did any evidence indicate that Combs aided, encouraged, or incited, with the intent to further that offense, either Bryant or Boring.

This Court in Moore v. Commonwealth, 282 S.W.2d 613 (1955) held that more evidence than that which was presented below is required to constitute one an aider and abettor, much less a principal.

This Court, citing Moore and Bradley v. Commonwealth, 201 Ky. 413, 257 S.W. 11 (1923) as found in Roberts v. Commonwealth, 212 Ky. 791, 280 S.W. 111, set out the limitations of the offense of aiding and abetting in Warfield v. Commonwealth, Ky., 334 S.W.2d 913 (1960):

Our enunciation of the law in  
Roberts v. Commonwealth, 212 Ky. 791,  
280 S.W. 111, 112, positively de-  
signates the requisites. In that  
case we said:

"In order to constitute one  
an aider or abetter in the  
commission of a crime he  
must be actually or con-  
structively present at the  
time of its commission and  
participate in some way in  
the act committed. It is  
not essential that there  
should be a prearrangement

or mutual understanding or concert of action, but in the absence of these, it is essential that the one so charged should in some way either by overt act or by expression or advocacy or sympathy encourage the principal in his unlawful acts."

A negative view is seen in *Moore v. Commonwealth*, Ky., 282 S.W.2d 613, 614, cited by appellant. There we said:

"(1,2) \* \* \* The rule is that a conviction is not justified by suspicion and evidence of relationship among the accused or by their mere association at a time when a crime was committed by one of them. Mere acquiescence in, or approval of, the criminal act, without cooperation or agreement to cooperate in its commission, is not sufficient to constitute one an aider and abettor. *Hurst v. Commonwealth*, 284 Ky. 599, 145 S.W.2d 520; *Bradley v. Commonwealth*, 201 Ky. 413, 257 S.W. 11; and *McKinney v. Commonwealth*, 284 Ky. 16, 143 S.W.2d 745." Id., at p. 914.

At most, the evidence below reveals that Appellant acquiesced in the commission of the offense charged. This is obviously not enough to prove guilt on his part. See Levering v. Commonwealth, 132 Ky. 666, 117 S.W. 253 (1909).

The total evidence below was more consistent with innocence than with guilt. The testimony of Appellant explaining the suspicious circumstances in which he was found was totally consistent with the testimony of the Commonwealth witnesses. The only apparent discrepancy in Appellant's story arose during his cross-examination on pages 24 and 25 of the Transcript of Evidence. Appellant had testified that he was with Bryant and Boring at Florence Kelly's house which was two blocks from Rev. Boggs' house in Sunshine,



a community on the outskirts of Harlan (T.E., p. 22). All three were seen there at 11:00 p.m. (T.E., p. 18). He had further testified they then went to a trailer park "at the upper end of Sunshine near Dressen," where they parted company (T.E., p. 22). Shortly thereafter Boring and Bryant picked him up "on the highway in Dressen, thumbing a ride to Baxter," to spend the night (T.E., p. 23). The car was stopped in Harlan, at somewhere between 11:00 and 11:30 p.m. (T.E., p. 14). On cross-examination the Commonwealth Attorney asked,

"10. The trailer park is a mile from Bobby Boring's [Florence Kelly's] house, isn't it?"

implying that Appellant's story was physically implausible.

As a matter of fact, an examination of the General Highway Map of Harlan County, Kentucky, prepared by the Kentucky Department of Transportation, reveals that the community of Sunshine is no more than one-half mile from one end to the other. See attachment. Florence Kelly lived two blocks from Rev. Boggs, who lived in Sunshine (T.E., p. 2). The furthest which Bobby Boring or Gary Bryant had to walk was one mile: the one-half mile to the trailer park near Dressen and back to Boggs' house. They apparently then drove the one-half mile back toward Dressen on Route 2426, out onto U.S. 421 where they met Appellant, and took him the one-half mile into Harlan where they were stopped. See attachment.

It is quite conceivable that this could occur in 20 or 30 minutes, as testified by Appellant. This would fit into the time frame described by Florence Kelly and the officers who stopped the car.

Appellant's testimony is rendered additionally credible by the fact that he injected into evidence the fact upon which Mr. Unthank seized to impeach him. He alone testified, after hearing all the witnesses that he, Bryant and Boring had gone to the trailer park before they parted. Had he merely been attempting to make his story consistent with the Commonwealth's, there would have been no need to add that fact.


Viewed in its entirety, the evidence against Appellant does no more than create a suspicion that he participated overtly in the theft of Rev. Boggs' automobile. Obviously, suspicion alone is not enough to submit evidence in a criminal case to the jury. Hodges v. Commonwealth, Ky., 473 S.W.2d 811 (1971). Since the evidence against Appellant was more consistent with innocence than with guilt, a verdict of acquittal should have been directed by the court below. Ralya v. Commonwealth, Ky., 495 S.W.2d 506 (1973).

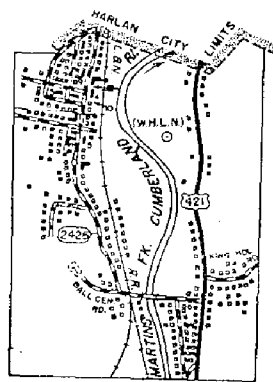
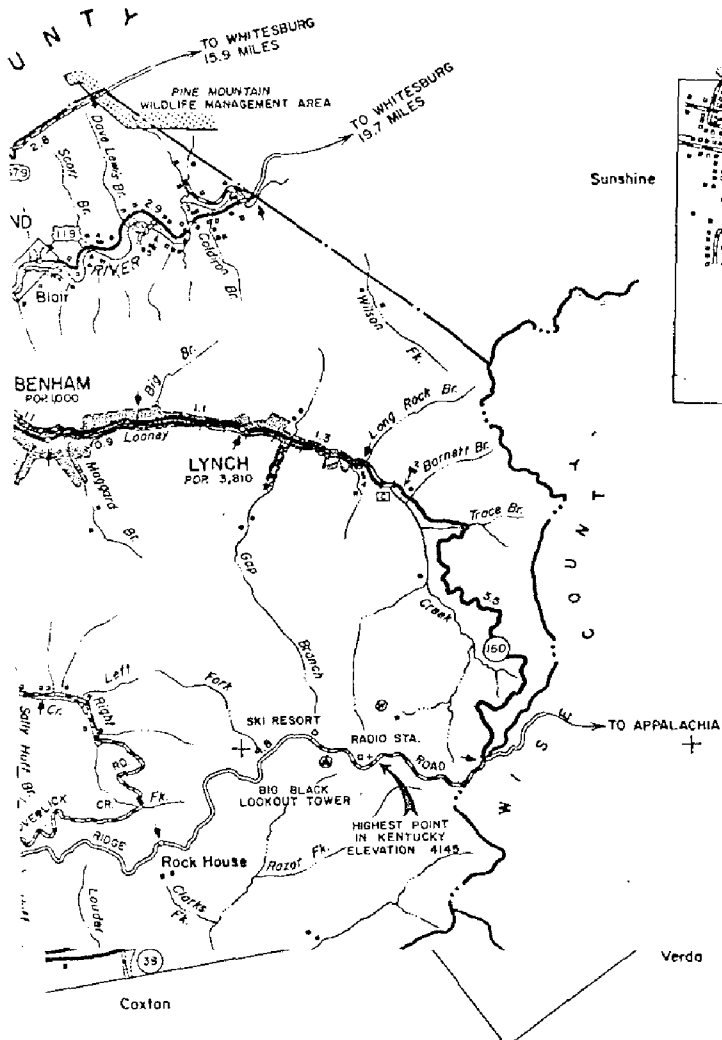
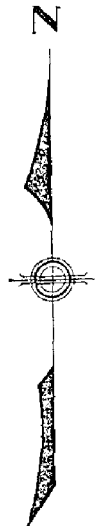
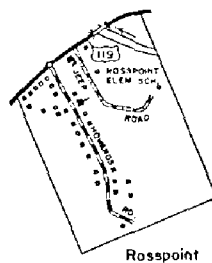
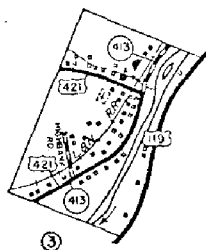
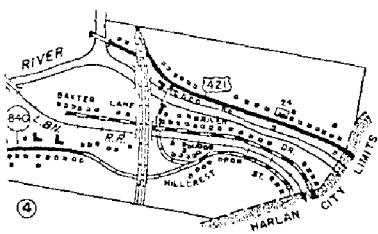
#### CONCLUSION

For the reason set out above, Appellant submits that his conviction should be reversed.

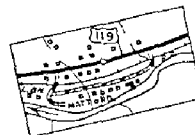
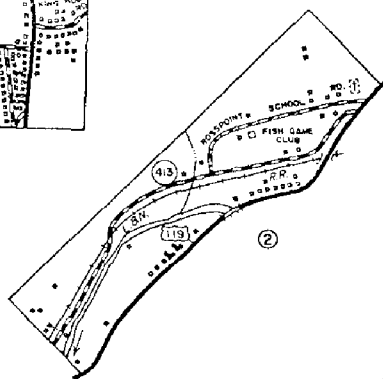
Respectfully submitted,

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625 LEAWOOD DRIVE  
FRANKFORT, KENTUCKY

BY:   
ANNA H. ISAACS  
ASSISTANT PUBLIC DEFENDER



Dressen



Dillon



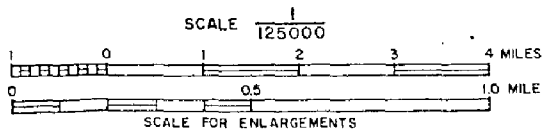
Putney



Kildow

# GENERAL HIGHWAY MAP HARLAN COUNTY KENTUCKY

PREPARED BY THE  
KENTUCKY DEPARTMENT OF TRANSPORTATION  
OFFICE OF TRANSPORTATION PLANNING  
DIVISION OF TRANSPORTATION FACILITIES PLANNING  
IN COOPERATION WITH THE  
U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL HIGHWAY ADMINISTRATION



POLYCONIC PROJECTION

ORIGINAL DATA 1973			
REVISIONS			
DATE	BY	DATE	BY
1-1-74	JL Mc		
1-1-75	JR D		